XI-HC-78

(48)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक C.A. 202/ सन् 2004

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

APPELLANT:
(In Jail)

Santosh Kumar Sahu,
S/o Vedram Sahu,
Aged about 35 years,
R/o Village Satmara,
P.S. Ranchirai, Distt. Durg (C.G.)

- Versus -

RESPONDENT:

The State of Chhattisgarh

{Criminal appeal under Section 374 (2) of the Code of Criminal Procedure}

Division Bench:

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Sunil Kumar Sinha, JJ.

20-12-2007

Mr. R.K. Jain, counsel for the appellant.

Mr. U.K.S. Chandel, Panel Lawyer for the State/respondent.

Oral judgment dictated on Dais.

Sunil Kumar Sinha, J: -

1. This appeal is directed against the judgment of conviction and order of sentence dated 20-10-2003 passed by the 7th Additional Sessions Judge (Fast Track Court), Durg, in Sessions Trial No.87/2001 by which the appellant has been convicted under Sections 302, 458 & 323 of the I.P.C. and sentenced to undergo imprisonment for life & pay a fine of Rs.500/-, in default of payment of fine to further undergo S.I. for one month, to undergo R.I. for seven years & pay a fine of Rs.200/-, in default of payment of fine to further undergo S.I. for one month and to

(49)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr.A 202 / सन् 2004

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

undergo S.I. for three months, respectively, with a further direction to run the sentences concurrently.

2. Case of the prosecution is that in the intervening night of 21-1-2001 & 22-1-2001 the deceased namely, Kriparam, his wife Ardho Bai (PW-4) and his daughter Radhika Bai (PW-3) were sleeping in their house. The deceased was sleeping in the Varandah of the house, whereas his wife & daughter were sleeping inside the room. At about 1.30 mid night, daughter & wife of the deceased heard some sound from the Varandah, they woke up, at that time somebody opened the door of their room and entered inside the room, he threw torch light on the face of the wife of the deceased, wife of the deceased asked as to who is he. The person entering there said her to keep quite and he also assaulted Ardho Bai (PW-4) with some iron equipment. He also tried to assault Radhika Bai (PW-3), but she caught the equipment and started carrying like 'save save'. On this, the said person ran away from their house from the Badi portion of the house. Radhika Bai switched on the lights and she could see that person from backside. He was a person of short height and lean & thin personality. He was wearing yellow-cream coloured jacket and was also keeping saffron shawl on his head. Radhika Bai saw her father, he had received serious injuries. Her mother had also received injuries. Radhika Bai called her brother and they took both the injured to the hospital. The deceased died on the way to the hospital. The matter was informed in the Police station on which merg intimation Ex.P-6 was lodged. Based on such merg intimation, first information report Ex.P-4 was registered.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक CrA 202 / सन् 2004

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

3. After receiving the information, the Station House Officer left for the scene of occurrence. He prepared site plan under Ex.P-5. Sari of Ardho Bai was seized under Ex.P-7. A portion of bedding containing blood stains, on which Ardho Bai was sleeping, was seized under Ex.P-7A. One bed sheet was seized under Ex.P-11. Blood stained soil & plain soil were seized under Ex.P-12. Clothes of the deceased were seized under Ex.P-13. The Investigating Officer gave notice Ex.P-8 to the Panchas and prepared inquest Ex.P-9 on the body of the deceased. Dead body of the deceased was sent for post-mortem examination to Government Hospital, Gunderdehi under Ex.P-10, where Dr. C.B. Prasad (PW-12) conducted post-mortem and prepared report Ex.P-23. He noticed following injuries: -

a) Blood stains were present near nose and blood stains were also present on eye membrane & right cheek.
b) There was a lacerated wound on left side of head admeasuring 3" x 2" x 1" and the underlying bone was fractured. It was a compound fracture.

On internal examination, the doctor found that head bone was fractured into many pieces and massive blood clots were there in the head, remaining internal organs were pale, liver & kidney were congested. According to his opinion, cause of death was coma due to fracture of skull bone with excessive intra cerebral haemorrhage and the death was homicidal in nature.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक G.A 202/ सन् 2004

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

4. After taking the accused/appellant into custody, his memorandum under Section 27 of the Indian Evidence Act was recorded vide Ex.P-1 and in pursuance of the said memorandum, one Kotia (small iron equipment used in bullock cart), one woolen shawl, one full pant, one full shirt & one small torch were seized form his possession under Ex.P-1A.

5. After completion of usual investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Durg, who in turn committed the case to the Court of Sessions Judge, Durg, from where it was received on transfer by the 7th Additional Sessions Judge, Fast Track Court, Durg, who conducted trial and convicted & sentenced the accused/appellant as aforementioned.

6. At the very outset, learned counsel for the appellant has not disputed the homicidal death of the deceased. Moreover, it comes in the evidence of the injured namely, Ardho Bai (PW-4) that in the fateful night she heard some noise from the Varandah where her husband was sleeping, just thereafter some body entered into her room and assaulted her, he also tried to assault her daughter namely, Radhika Bai. Thereafter, said person ran away from their house and when they went to the Varandah, they saw that deceased Kriparam was lying there in injured condition having serious injuries on his head and when he was taken to the hospital, he died on the way to the hospital. After his death, the body was sent for post-mortem examination and post-mortem was conducted by Dr. C.B. Prasad (PW-12) who gave report Ex.P-23,

/59— 8/2007 —30,000.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

52

मामला क्रमांक CrA 202/ सन् 2004

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

according to which, above injuries were found on the body of the deceased which were ante-mortem in nature, cause of death was coma due to fracture of skull bone & massive intra cerebral haemorrhage and death was homicidal in nature. In view of the above ocular and medical evidence, it is established that death of the deceased was homicidal in nature.

7. As far as complicity of the accused in the crime in question is concerned, learned counsel for the appellant argues that on the basis of evidence of Radhika Bai (PW-3) & Ardho Bai (PW-4) it has not been established that it was the accused who entered into their house, committed the murder of the deceased and has assaulted Ardho Bai (PW-4). He submits that in the facts and circumstances of this case, when the accused was taken into custody on 25-1-2001, a test identification parade would have been conducted by the prosecution, but nothing was done and ultimately the two eyewitnesses namely, Radhika Bai (PW-3) & Ardho Bai (PW-4) have tried to implicate the accused by identifying him in the Court for the first time when their evidence were recorded on 5-3-2002 & 5-4-2002. Learned counsel further submits that in the above circumstances, the accused/appellant should be given the benefit of doubt.

8. On the other hand, learned Panel Lawyer opposes these arguments and supports the judgment of conviction and order of sentence passed by the trial Court.

/59— 8/2007 —30,000.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(53)

मामला क्रमांक CrA 202/ **सन्** 2004

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

9. We have heard Mr. R.K. Jain, learned counsel for the appellant & Mr. U.K.S. Chandel, learned Panel Lawyer on behalf of the State and have also perused the records of the sessions case.

10. Admittedly, the F.I.R. (Ex.P-4) in this case was lodged by Radhika Bai (PW-3). The first information report, which was lodged by her on 22-7-2001 at about 7.05 a.m. i.e. almost same day, does not contain name of the appellant or any other person as assailant. This witness had given details of the incident in the first information report. It is contained in the report that she heard some noise from the side where her father was sleeping and she also heard the sound of steps. On hearing so, she and her mother woke up. At that time, somebody opened the door of their room and entered in the room, that person threw torch light on her mother on which her mother said as to who is he, then that person said to keep quite. There was some talk between that person & her mother, at that time, said person who was holding some equipment in his hand assaulted her mother on her head. He also tried to assault her, but she caught the equipment and started crying like 'save save' on which said person ran away from the Badi side of their house. On this, she switched on the lights and saw that person from backside. He was a person of short height having lean & thin personality, wearing yellow-cream pant and keeping a saffron coloured shawl on his head. This is the only information given by Radhika Bai (PW-3) to the Police in the first information report. Based on this report, investigation commenced and ultimately, on suspicion, the accused/appellant was taken into custody on 25-1-2001 and his memorandum was recorded. When this

—FS/59— 8/2007 —30,000.

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	was the evidence available with the prosecution up to 25-1-2001 and a person was taken into custody on the said date, it was the duty of the prosecution to at least put that person for test identification parade before Radhika Bai (PW-3) & Ardho Bai (PW-4) and ascertain as to whether he was the actual culprit of the crime in question or not. This was not done by the prosecution and on the basis of the memorandum, only seizure of iron equipment (Kotia), above clothes & torch,which are admittedly belonging to the accused/appellant,were made and even these articles were also not put to identification to the eyewitnesses for proving as to whether the assailant was actually wearing those clothes or he was holding that torch which was seized form his possession.	
	11. So far as the evidence of these two witnesses namely, Radhika Bai (PW-3) & Ardho Bai (PW-4) are concerned, Radhika Bai (PW-3) has deposed before the Court on 5-3-2002 that at about 1.30 hrs. on the fateful night when she was sleeping in her house, she heard a sound from the Varandah where her father was sleeping, on this she & her mother both woke up. Thereafter, the accused/appellant entered into their room holding torch in his hand, he switched on the torch and at that time he also assaulted her mother. He had also tried to assault her, but she stopped the assault and cried like 'brother, brother' on which the accused ran away form their house. Major improvement in the evidence of this witness is that in her statement under Section 161 of the Cr.P.C. (Ex.D-2), name of the accused is not there, but in her evidence before the Court she is taking the name of the accused. When she was confronted by her police case diary statement Ex.D-2 as also first	

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक G.A. 202/ सन् 2004

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

information report Ex.P-4 regarding omission of name of the accused in these documents, she could not give any explanation for the same. She has most categorically deposed in para 12 of her evidence that she had seen the accused from front side and she mentioned this fact in her police case diary statement Ex.D-2 as also in her report Ex.P-4, but if these facts have not been written there, she cannot tell reason for the same. She has also deposed that there is no animosity between their family and the accused. She has further deposed that the accused does not belong to her family and he is not a relation from village side. She has specifically deposed that she was not in fear from the accused. She has also deposed that the Police had never called her for identification of the accused.

12. Ardho Bai (PW-4) has also deposed in similar fashion. She has identified the accused/appellant before the Court during her examination-in-chief. She has stated that the accused/appellant had entered into their room and assaulted her with Kotia, she had clearly identified the accused/appellant at that time and thereafter, she became unconscious. In para 3 of her evidence, she has deposed by taking the name of the accused/appellant saying that he had assaulted her and she had clearly identified him. In cross-examination, when she was faced with her police case diary statement Ex.D-4 in which she had not taken the name of the assailant, she had also not given any explanation for such omission.

शासकीय क्षेत्रीय मुद्रणालय, ... —FS/59— 8/2007 —30.000.

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

13. Admittedly, omission of the name of the accused in the first information report as also in the police case diary statements of these two witnesses i.e. Radhika Bai (PW-3) & Ardho Bai (PW-4) is fatal for the prosecution. If the accused/appellant was identified by these two witnesses in a natural manner, his name should have been mentioned in the first information and he should also have been named in the police case diary statements of these two witnesses which is lacking in this case. Omission of the name of the appellant in the F.I.R. as also in the police case diary statements Exs.D-2 & D-4 throws shadow on the credibility of these two witnesses. Certainly they are exaggerating their evidence before the Court and they are adding the name of the accused/ appellant for the first time before the Court when their evidence were recorded after a very long period.

14. About serious lacuna in the prosecution case i.e. not putting the accused to test identification parade, principle laid down by the Apex Court in the matter of **Bollavaram Pedda Narsi Reddy and others vs. State of Andhra Pradesh** reported in **1991 SCC (Cri) 586** is important. It is has been held by the Apex Court that

> "The credibility of the evidence relating to the identification depends largely on the opportunity the witness had to observe the assailants when the crime was committed and memorize the impression. When the crime was committed during the hours of darkness and the assailants were utter strangers to the witnesses, the identification of the accused persons assumes great importance. The prevailing light is a matter of crucial significance. The necessity to have the suspects identified by the witnesses soon after their arrest also arises. In absence of cogent evidence that the

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr.A.202/... **सन्** 200/-

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

witnesses by reason of the visibility of the light at the place of occurrence and proximity to the assailants had a clear vision of the action of each one of the accused persons in order that their features could get impressed in their minds to enable them to recollect the same and identify the assailants even after a long lapse of time, it would be hazardous to draw the inference that the accused-appellants are the real assailants."

15. In the present case also even for the sake of argument we ignore the part that the prosecution could not conduct test identification parade, but features of the assailant have also not been described by the maker of F.I.R. Ex.P-4. She has clearly mentioned in the F.I.R. that she had an occasion to see the assailant from backside, the assailant was keeping shawl on his head & wearing some clothes. A clear presumption can be drawn that from backside features, particularly face features etc. of the assailant, could not have been seen by the maker of the F.I.R. Even if the test identification parade would have been conducted, perhaps it would have been difficult for this Court to rely on such identification when there was hardly any chance of identification by two witnesses particularly by the maker of the F.I.R. Be that as it may, in this case, admittedly, test identification parade has not been conducted by the prosecution and dock identification in the Court has been done by the two eyewitnesses namely, Radhika Bai (PW-3) & Ardho Bai (PW-4). Ardho Bai is taking name of the assailant and she has deposed in a fashion as if the assailant was previously well known to her. On the basis of evidence of these two witnesses, as also on the point that the

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(58)

मामला क्रमांक Cr A 202/ सन् 2004

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	~~prosecution has failed to conduct test identification parade~~, no conviction can rest.	
	16. As far as memorandum & seizure of articles, on which the trial Court has very much relied for resting conviction, are concerned, admittedly the seized articles were belonging to the accused. Clothes & torch are not incriminating articles and Kotia (the iron equipment used in bullock carts) is a very common article which could be found in the houses of every villager. Moreover, no chemical examiner report has been received by the prosecution regarding these articles. Therefore, no weightage can be given to recovery of these articles from the possession of the appellant on his memorandum. For the foregoing reasons, we do not find any clinching, cogent and reliable evidence in this case for convicting the appellant under Section 302 of the I.P.C. and other Sections.	
	17. In the result, the appeal deserves to be allowed by giving benefit of doubt to the appellant. It is accordingly, allowed. Conviction and sentences imposed upon the appellant under Sections 302, 458 & 323 of the I.P.C. are set aside and he is acquitted of the said charges. It is stated that the appellant is in jail. He be set at liberty forthwith, unless required to be detained in any other case.	
Soma	**Sd/-** **L.C. Bhadoo** **Judge**	**Sd/-** **Sunil Kumar Sinha** **Judge**

शासकीय क्षेत्रीय मुद्रणालय, राजनांदगांव —FS/59— 8/2007 —30.000.